

SJ 7--Examination of Requiring Criminal Background Checks for Direct Care Workers

Appeals Processes Recommendation for Appeals Process in Montana

April 2008

10 STATE SUMMARY: FROM JANUARY 2008

Seven (7) States have an identified Appeal Processes (Alaska, Arizona, Idaho, Minnesota, New Mexico, Oklahoma and Oregon)

- Three (3) States limit the appeal to crimes which fall outside of their 'permanent' categories.
- Four (4) States use a committee structure to make decisions, while the other three involve a Commissioner or other designated department staff person.
- One (1) State limits appeals to areas involving their central abuse registries.

Two (2) States (Kansas and Nevada) limit the appeal process to the accuracy of the criminal record only. No other considerations are allowed.

One (1) State - no response, nothing specific found in their on-line statutes.

During the discussion at the February 2008 SJ7 workgroup meeting, the workgroup was presented a proposal to follow the strategies of Kansas and Nevada and adopt a process which limits any "appeal" to the accuracy of the criminal history record only. This proposal was discussed and rejected by the workgroup and the department staff was directed to prepare an appeals process for Montana that would allow an applicant the ability to not only appeal the accuracy of the criminal history record but also appeal a notification of a disqualifying criminal history record.

Based upon this direction the department has reviewed the information obtained from the 10 States identified by the workgroup and prepared the following recommendation for an Appeals Process for Montana.

APPEALS PROCESS FOR MONTANA

Appeal the accuracy of the criminal history record Department of Justice (DOJ)

Montana will allow the individual to follow the appeal process established through the criminal justice legal system. This appeal process will be defined by the Montana Department of Justice (DOJ). If an applicant is successful in getting a conviction overturned or expunged then DPHHS officials will rescind the prohibition under Montana law.

If a person challenges a denial of an opportunity to volunteer or be employed by the authorized entity on the basis of a criminal history background check result, the person can be provided a copy of the criminal history record after verifying their identity. If a person believes their criminal history record is in error, they must contact DOJ for assistance in correcting the error.

Procedures for challenging and correcting criminal record information are contained in MCA 44-5-215. There is a \$10.00 charge if fingerprint verification required for a Montana record; \$18.00 if for a FBI record.

Appeal a notification of a disqualifying criminal history record
Department of Public Health and Human Services (DPHHS)

1. Appeal the notification of a disqualifying criminal history record directly to the Quality Assurance Division (QAD) who will be responsible for program administration. The appeal process will be referred to as “Administrative Reconsideration (AR)”. This process is intended to be an informal non-adversarial administrative review of written documentation
2. QAD program will conduct an Administrative Reconsideration on the basis of the applicability to the law and requirements for disqualification based upon the criminal history record. This review will be based upon the written and complete request for reconsideration and all supporting documents (see below) submitted. Additional documentation can be requested by the department.
3. The appeal will not be allowed based upon the provider’s determination of employment.
4. Appeal will be based upon the applicant’s ability to demonstrate sufficient rehabilitation to warrant the public’s trust.
5. QAD will initiate a Joint Review of all requests for AR and determine an: Approval of the AR or Denial of the AR. This committee for this Joint Review will be defined by Administrative Rule.
6. All denials will require a peer review by a professional in the criminal justice system (TBD).
7. All AR denials will be provided the right to appeal the decision and request a “Fair Hearing”. The Fair Hearing will be conducted by the Office of Fair Hearings at DPHHS in accordance with the Montana Administrative Procedure Act (MAPA) and the Department’s Administrative Rules of Montana. The Hearing Officer will have the ability to uphold the AR denial or overturn the AR denial, based upon the evidence presented in accordance with 2-4-612, MCA.
8. A party who is aggrieved by a final Fair Hearing decision may seek judicial review.

All approval determinations are limited to the application of the disqualifications based upon the criminal history record as contained in the law or administrative rule and will not be a determination to require an employer to hire an applicant. All decisions regarding the employment of an applicant are at the employer’s discretion. All applicable state and federal laws regarding discrimination and civil rights apply.

Montana will use a documentation requirements and process that is similar to that used by the State of New Mexico.

Administrative Reconsideration - An individual, who has received notification of a disqualifying criminal history record, must submit a written request for administrative reconsideration.

The documentation submitted with the request for an administrative reconsideration must include the following:

1. A comprehensive rationale for why the AR should be granted;
2. A demonstration that in spite of the conviction, the health, safety and welfare of recipients will not be impacted;
3. Letters of recommendation from credible persons not related to the individual;
4. Credible and reliable evidence of the actual disposition of any arrest for which the nationwide criminal history was incomplete;
5. The age of the individual at the time of each disqualifying conviction;

6. Any mitigating circumstances when the offense was committed;
7. Any court imposed sentence or punishment and if completed, the date of completion;
8. Any successfully completed rehabilitation program since the offense;
9. The individuals full employment history since the disqualifying convictions; and
10. Other relevant materials the individual may wish to submit.

Factors in Making Determination:

1. Must consider the “Act” as defined by the legislature (TBD);
2. The severity or nature of the crime or other findings;
3. Total number of disqualifying convictions and pattern of incidents;
4. Time elapsed since last disqualifying conviction or since discharge of the sentence;
5. Circumstances surrounding the incident that would help determine the risk of repetition;
6. Circumstances of the crime including whether violence was involved;
7. Relationship of the incident to the care of children or vulnerable adults;
8. Activities evidencing rehabilitation (substance abuse or other rehab programs);
9. Whether conviction was expunged by the court or whether an unconditional pardon was granted;
10. False or misleading statements about any conviction in the signed declaration;
11. Evidence that the individual poses no risk of harm to the health and safety of care recipients;
12. Age of the individual at time of the disqualifying conviction;
13. Granting of a pardon by the Governor or President; or
14. The falsification or omission of information on the application form and other supplemental forms submitted.

Grounds for Reconsideration Clearance Determination: Clearance can be given when the request for reconsideration and the accompanying documentation clearly demonstrates that the individual has satisfied *one* of the following grounds for such clearance:

1. Inaccuracy - The record inaccurately reflects a disqualifying conviction. Includes factual error, error in the departments application or use of the applicable criminal statute/standard, conviction that lacks a final disposition
2. No Risk of Harm

DPHHS will refine and define this process through the Administrative Rule process as granted in the Act.